

VIRGINIA:

**BEFORE THE STATE HEALTH DEPARTMENT
SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD**

In Re: Mr. Michael Bianucci

ORDER

Findings of Fact.

Based upon the entirety of the record of this matter and the documents, other evidence and argument offered by the parties, the Board makes the following findings of fact:

Mr. Michael Bianucci ("Mr. Bianucci") and Mrs. Adrienne Bianucci ("Mrs. Bianucci") (collectively, the "Bianuccis") are the owners of record of a certain parcel of property identified as Lot 14, Section VI, Windsor Park Subdivision or 12412 Trumpington Court in Chesterfield County (the "Property").

The Property is approximately one (1) acres in size and a four (4) bedroom residence (the "House") is located on the Property. An onsite sewage disposal system was installed on the Property in December of 2001.

In 1995, Tim P. Sexton, CPSS ("Mr. Sexton"), prepared a soil evaluation report (the "Report," see Commonwealth's Exhibit 1) for the Property which he submitted to the Chesterfield County Health Department (the "Local Health Department" or "LHD") pursuant to the Chesterfield County subdivision process. In the Report, Mr. Sexton rated the soils on the Property as "fair" for the use as a septic system drainfield site. Accordingly, Mr. Sexton recommended a suitable drainfield location for the Property identified on a scale drawing attached to the Report. He recommended an installation depth of "36+ [inches]" and drainfield dimensions of 450 square feet per bedroom. Based upon these recommended dimensions, it appears Mr. Sexton estimated a percolation rate of 60 minutes per inch at the recommended installation depth.

The LDH approved the Property for recordation in accordance with the Chesterfield County subdivision ordinances. There exists no file documents indicating what review LDH conducted prior to approving recordation of the Property.

On March 2, 2000, Thomas Anderson, duly authorized agent of Anderson & Atkinson Builders, Inc., applied for a sewage disposal system construction permit (the "Permit") for construction of a conventional, onsite septic system (the "System") to serve a four bedroom house on the Property. (Com. Ex. 2).

On March 10, 2000, Amy Baker (“Ms. Baker”), Environmental Health Specialist Senior (“EHSS”) for Chesterfield County, issued the Permit for construction of the System. (Com. Ex. 3).

There exist no file documents showing what review Ms. Baker conducted prior to issuing the Permit. As issued, the Permit indicates an installation depth of 72 inches and drainfield dimensions of 420 square feet per bedroom. Accordingly, the Permit estimates a percolation rate of approximately 55 minutes per inch.

A handwritten note on the Permit indicates that. On June 25, 2001, Ms. Baker changed the terms of the Permit to require installation of a pump (the “Pump”) serving the permitted septic system. There exists no file documents explaining why Ms. Baker made such change and Ms. Baker no longer works for the LDH.

A December 8 inspection report prepared by Ms. Baker indicates that a Carl Johnson (“Mr. Johnson”) installed the system according to the terms of the Permit as amended, except that Mr. Johnson did not install a panel box for the Pump at the time of installation. Mr. Johnson apparently also failed to execute a Completion Statement regarding the system and the LDH did not issue an Operation Permit for the system. (Com. Ex. 3).

On November 12, 2002, the LDH received an anonymous complaint stating that the System was failing. (Com. Ex. 4).

On November 15, 2002, an LDH official visited the Property and confirmed that the System was failing, noting the presence of septic tank effluent on the surface of the ground. (Com. Ex. 4).

On November 25, 2002 and December 2, 2002, Environmental Health Supervisor Robert Bowers (“Mr. Bowes”) and Chesterfield County EHSS Eric Debrosky (“Mr. Debrosky”), visited the Property. As of November 25, 2002, they reported no effluent odor over the distribution box or the drainfield. They did, however, observe a clear, odorless liquid running over certain portions of the Property. They also reported that the System’s drainfield soils were “ok” and that there existed a perched water table at a depth of about 48 inches over the drainfield area. (Com. Ex. 4).

On December 2, 2002, Mr. Bowers and Mr. Debrosky determined that the Pump operated at a run time of about two (2) minutes with a five (5) inch draw down in the pump chamber. They noted that Mr. Johnson would install a pump-cycle counter and that Mr. Bianucci would report the number of pump cycles to the LDH. They also noted that effluent rose to the surface of the drainfield when the pump turned on — possibly an indication that the pump rate was too fast. (Com. Ex. 4).

On or about December 12, 2002, Mr. Bianucci made an initial request for reimbursement from the Onsite Sewage Indemnification Fund (the “Fund”) (see Com. Ex. 5). In his initial request, Mr. Bianucci set forth the following:

- The Bianuccis moved onto the Property in April of 2001 and noted problems with the System approximately one (1) month later;

- Mr. Johnson slowed the Pump's pump rate and adjusted the baffles in the System's distribution box, but problems with the System continued;
- Ten to twelve inches of mulch were removed from a portion of the drainfield at a cost of \$1,500.00, but problems with the System continued;
- Mr. Bowers recommended installing French drains around the septic tanks because of high groundwater and Mr. Johnson installed those drains in May, 2002;
- Installation of the French drains damaged the Property's sprinkler system;
- The System appeared to work until October, 2002, when six inches of rain fell in a short period of time;
- The recommended Pump cycle counter would be installed within a week of the request.

On January 31, 2003, Mr. Bianucci applied for a permit to repair his failing System. On February 18, 2003, Jason Hackler ("Mr. Hackler"), EHSS for the LDH, issued a repair permit requiring installation of a secondary treatment unit and an LCMI at a depth of 46 inches. (Com. Ex. 9).

By letter of December 26, 2002, VDH advised Mr. Bianucci that his initial request for reimbursement was incomplete. (Com. Ex. 6).

On January 10, 2003, Dwayne Roadcap ("Mr. Roadcap"), a Project Manager with VDH, and Jay Conta ("Mr. Conta"), a soil scientist with Virginia Tech, visited the Property. (See Com. Ex. 7, 8, 12, 13). Mr. Roadcap and Mr. Conta observed the following regarding the System:

- The Pump controls did not include a manual override or master disconnect switch;
- The System's distribution box lid was broken and someone had placed a new lid over the broken lid;
- Septic effluent filled the distribution box to the brim of the box;
- A sprinkler system had been installed over the drainfield, with 4 sprinkler valves located at the end of trenches #2 and #3 of the System;
- Reports from the Pump cycle counter indicated that the System Pump was cycling approximately two (2) times per day;
- The first septic tank contained 2.5 feet of solids at the inlet end and the Pump chamber contained 10-12 inches of solids;

- Auger holes indicated that the drainfield trenches had been installed at a depth of 57 inches and that effluent immediately rose to within 21 inches of the surface;
- Auger holes revealed subground gravels in the upper profile of the soils near the drainfield, indicating capping or transported sediments overlying the residual soil;
- Auger holes revealed light gray iron depletions (mottles) and a restrictive clayey soil strata from about 35 inches to about 64 inches below the surface;
- At about 64 inches, auger holes revealed saprolite that was easier to auger than the clayey strata;
- Below 88 inches, auger holes revealed that the saprolite became denser and hard to auger.

Based on this information, Mr. Conta concluded that the soils in the drainfield, at the installation depth of 72 inches, “appear to meet the Sewage [Handling and Disposal] Regulations requirements in effect at the time of the System’s design.” Mr. Conta concluded that the System’s estimated percolation rate of 55 minutes per inch was reasonable. He noted, however, that there was a restriction at a depth of about 36 inches and that the drainfield was installed below the restriction. Mr. Conta also concluded that an LGMI should have been part of the original design of the System and that perched water at the site appeared to contribute to the hydrologic overloading of the System.

Mr. Conta also conducted research, with partners including Mr. Sexton, of the hydrologic conductivity of saprolite soils on Lot # 24, located across the street from the Bianucci’s Property. Mr. Conta and his partners found that saprolite soils meeting the requirements of the Sewage Handling and Disposal Regulations (hereinafter, the “Regulations”) by color and texture, tend to exhibit very slow rates of permeability when tested.

Based upon the above, VDH decided as follows concerning Mr. Bianucci’s request for indemnification from the Fund:

- Mr. Sexton failed to recommend an LGMI when he submitted his site and soil evaluation to LDH;
- The soils at the System’s installation depth likely have a slower percolation rate than estimated by Mr. Sexton;
- The lawn irrigation system added excess water to the drainfield;
- Mr. Bianucci may have exceeded the System’s design limit; and
- The System failed within three (3) years of construction.

The record reveals no action by VDH that caused the System to fail. Instead, the System's failure is the result of private party error and a combination of factors not controlled by VDH.

VDH nevertheless previously recommended a partial award of \$4,177.32 based upon: one-half the cost of grading the Property in 2002; one-half the cost of pumping the System's septic tanks on March 21, 2002; and the cost of installing the LGMI.

Conclusions of Law.

The Board enters the following conclusions of law:

CODE § 32.1-164 provides that the Regulations "shall govern the collection, conveyance, transportation, treatment and disposal of sewage" for the purpose of assuring that onsite sewage disposal systems are properly constructed and operated to ensure against the spread of human disease. (*See Commonwealth's Exhibit 16*).

The Board of Health lawfully promulgated the Regulations governing the permitting, construction and operation of onsite sewage disposal systems and lawfully issued the Permit.

The Board of Health has not adopted regulations governing requests for indemnification from the Fund, nor has VDH adopted administrative policies for the handling of such requests.

VDH's 1995 approval of Lot 14 and March 2, 2000 issuance of the Permit predate the July 1, 2000 amendments to the Regulations. Therefore, this case is governed by the Regulations in effect as of July 1, 1989.

Section 950.A.4 of the Regulations requires placement of soil absorption trenches below a soil restriction. The soil horizon into which a trench bottom is placed must be a soil type constituting a Texture Group 1, 2 or 3 under the Regulations, with an estimated or measured percolation rate less than 91 minutes per inch. The Regulations further require that the soil horizon be at least three (3) feet thick and that the trench bottom be placed at least two (2) feet from the water table and/or rock. In addition, the Regulations require that an LGMI be installed upslope of the absorption area with the invert LGMI extending into, but not through the soil restriction.

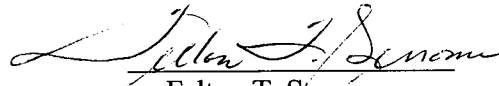
Va. Code § 32.1-164.1:01 establishes the Fund to assist property owners holding a valid septic tank permit when his septic tank system fails within three (3) years of construction and failure results from the negligence of VDH.

The failure of Mr. Bianucci's System did not result from the negligence of VDH, its agents or employees.

Nevertheless, VDH has recommended a partial award of \$4,177.32 to Mr. Bianucci.

WHEREFORE, the Board concludes that the Commissioner shall pay Mr. Bianucci from the Fund a total of \$4,177.32. Mr. Bianucci is not eligible for reimbursement for attorneys' fees and costs under CODE § 2.2-4030, which permits reimbursement of such moneys from an agency's operating expenses to a party prevailing upon judicial review of an agency case decision pursuant to CODE § 2.2-4025, et seq., or for certain proceedings otherwise exempted from the Virginia Administrative Process Act. See CODE §§ 2.2-4030(A); 2.2-4002, 2.2-4006, 2.2-4011 and 2.2-4018.

If Mr. Bianucci wishes to appeal this Order to Circuit Court, he should do so by: (1) filing a notice of appeal with Susan Sherertz, Sewage Handling and Disposal Appeal Review Board, within thirty (30) days of receipt of this Order; and (2) filing a Petition for Appeal with the Circuit Court within thirty (30) days of filing the Notice of Appeal as required by Rule 2A:4 of the Rules of the Supreme Court of Virginia.


Felton T. Sessoms
Chairman

Dated: March 8, 2004

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